

Black Lives and German Exceptionalism

Eddie Bruce-Jones

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The killings of George Floyd, Breonna Taylor and Elijah McClain by police officers in the United States have served as a crystallising moment around which a new dimension of a longstanding movement has come into being. Floyd, Taylor and McClain were, like many others before them, unlawfully killed by uniformed law enforcement officers in circumstances where civilians would have very little protection from swift charges of murder. The officer who killed Floyd was charged with second degree murder arguably only after public protest, sparked by a video of the officer kneeling on his neck for nearly nine minutes while he plead for life. The officers who killed Breonna Taylor have not yet been charged at all. The officers whose actions led to McClain's death have been cleared of all wrongdoing. The current protests in the United States and around the world are not only about policing; they cannot be understood without also understanding systems of racial oppression, including lynching, political repression, the development of mass incarceration and the disproportionate impacts of the criminal justice system on the black working class.

But of course, the protests are international. The nature of policing, not only in the [United States](#) but in many places in the world, and certainly in [Europe](#), is such that holding police to account for the deaths of innocent people is not only statistically improbable, but it is designed to be legally impractical. Such deaths are argued to be justified in the course of policing as collateral damage, necessary for the general effectiveness of policing practices. To make matters worse, racialisation, gender, migration status and mental health vulnerabilities play a role in the ways police encounter civilians as well as the narratives that result about the encounters – in the media, in the courtroom and in most any institutional apprehension of the encounter that is discussed or debated thereafter. This is easy to deduce, given the ever presence of [societal racism](#), xenophobia and lack of care for those who are mentally vulnerable in our societies, not to mention their various intersections, which magnify and transform their impacts. However, these things are difficult to quantify, given a lack of data, language and legal recognition of patterns and institutional and structural forms of bias. I will attempt to provide a sketch of how the law underwrites the invisibility of racism in Europe, allowing it room to flourish in the context of policing.

It should be noted that racism is not limited to anti-blackness nor restricted to the context of policing; however, I use policing and blackness as touchstones for this commentary precisely because this constellation of race and law is consistently thought to present a problem exceptional to the United States. It is not.

Data

In the United States, race has been used as a legal category of analysis in determining social inequality, marginalisation and disenfranchisement. It was declared as a 'suspect classification' by the Supreme Court (see [Korematsu v. United States](#), 323 U.S. 214 (1944)) and racial discrimination has been the legal grounds for a great deal of litigation during the 20th and 21st centuries there. The concept of race has changed over time, and it is defined in different ways in different parts of US law (see [Ian H. Lopez, White by Law](#), 2006). While the legal language and logics of race are decidedly imperfect, there is traction in language in the United States that enables advocates to state the claim that patterns of racism exist. This is in no small part due to the ability of US advocates to use or cite to the disaggregated data that illustrates racial disparities. This data powerfully illustrates the [disproportionate impact of the death penalty on people of colour](#) – both because people of colour are disproportionately sentenced to death for capital crimes, and because murders of white victims are more likely to be punished with the death penalty than murders of people of colour. Data also reveals the devastation of black working-class communities in urban areas caused by the [war on drugs](#), and the [targeted use of stop-and-frisk](#) by police against black and Latinx communities. Such disaggregated data has also been used to track disparities in educational opportunity, housing, and public health among people of colour, the latter of which has been vital in responding to the recent Covid19 pandemic.

In Germany, by contrast, there is no regular practice of disaggregating data regarding the experiences of racialised communities in the context of policing or social services (such as education). This means that identifying patterns of racism is much more difficult. In Germany, one must rely on self-reporting, independent and highly localised forms of data collection, and impressions gleaned from publicly available information. Alternatively, one can rely on proxies for race, but characteristics like language spoken at home and place of birth are not always good approximations of the experience of racialisation. One might argue that race itself is a proxy for lived experience, but one would then have to admit that it is a proxy that would more adequately describe the racial othering to which black people and other similarly situated groups are predisposed. In other words, without a useful data set, social and legal pathways that might be helpful in allowing those living in Germany to apprehend the scope and prevalence of racial disparities is stifled by a lack of existing racial data.

One way in which community organisers and civil-society organisations, such as the Campaign Against Police Brutality (KOP) have tried to address this lack is to work towards an institutionalised form of [chronicling stories of racial profiling](#), to provide a narrative of the widespread practice of [racial profiling of Black people](#) in Germany. The benefit of this approach is that sensitive data about identity is then offered on a voluntary basis and catalogued to emphasise the pattern of treatment these individuals experienced. Similarly, networks of organisations and campaigning groups have focused on the quality of the way police engage with black people, other people of colour, people with mental vulnerabilities and people

without citizenship status, and have noted similarities in the disproportionate use of force across a range of cases. These similarities include not just the use of racist stereotypes in justifying such force, and disparaging depictions of the characters of those who have died ([Eddie Bruce-Jones, *Race in the Shadow of Law*, 2016](#)), which not only supports the racial criminalisation of the victims, but also reduces public concern for the victims by appealing to broad societal racism. It is the tireless work of civil-society organisations and families and friends of those affected by police profiling and police brutality that have garnered the attention of the European Commission and set the stage for the forthcoming German governmental [review of racial profiling](#).

So in a very concrete sense, and despite concerns about the development of a surveillance culture where the state holds personal information that should ideally be deemed irrelevant (such as racial groups), the failure of some European states to develop ways to identify and measure the scope of racism and its effects ultimately means that institutional and structural racism is left to develop in law's shadow, while only the most overt and obvious forms of racism are identified and addressed.

Language

Measuring quantifiable aspects of racism is one thing, but knowing how to discuss and conceptualise race and racism in a qualitative sense is another. In order to be able to have a discussion about the effects of racialisation on communities of colour, one needs to develop a language that is able to grasp the many facets of racism. This is a problem not only in Germany, but in mainstream politics in most places throughout the world.

In the UK, where disaggregated statistics on race are kept, attention to language is nonetheless important, as it helps us conceptually frame what constitutes racism. The UK Prime Minister recently appointed an aide to assist the government in setting up a commission on racial inequalities. The aide is [well known for her scepticism that structural racism exists](#). A spokesperson of the civil-society think tank, the Institute of Race Relations [told *The Guardian*](#), that it would be “difficult to have any confidence in policy recommendations from someone who denies the existence of the very structures that produce the social inequalities experienced by black communities.” This appointment demonstrates that the issue of addressing societal racism is not merely one of representation (the aide is a woman of colour), but one of adopting an adequate framework for apprehending the embeddedness of racism in the structures of our political and social lives.

The public language of race and racism needs to be able to support the complex ways in which [racism, capitalism and history intertwine](#). It needs to be able to hold the legacies of colonialism, bordering and historical exploitation (see. e.g., [Katharina Oguntoye, et. al., *Farbe bekennen: afro-deutsche Frauen auf den Spuren ihrer Geschichte*, 1986](#)) in conversation with contemporary forms of racism, also in Germany. Otherwise, we would miss the continuities between colonial forms of racial violence and contemporary ones, and we would operate within the impoverished concept of racism as ahistorical, geographically contained, and disintegrated

from class, gender and other categories of social difference. We would fail to see the connections between policing violence in the US and similar phenomena in Germany. We would overlook the importance of debates that problematise monuments in the UK and [memorials](#) and [street names](#) in Germany – debates that have the potential to sharpen our understanding on how racism and colonial exploitation are commemorated and placed in the centre of public life.

In Europe, particularly in continental Europe, there is a strong mainstream belief that race is a problem anchored in and exacerbated by the United States, and that importing the logic of race (and the corresponding demands of anti-racism discourse) presents an irreconcilable mismatch in Europe. However, this view is largely ahistorical, and it fails to understand the development and global circulation of ideas of racism, rooted after all in the intellectual project of European enlightenment, and the multi-sited salience of tropes and symbols of anti-blackness (as one specific example of racism).

Our public language on racism must also have an eye toward critiques of legal institutions, logics, procedures and substantive principles that further entrench forms of racism. It is to this that I now turn.

Legal Non-recognition of Institutional Structural Racism

We are not presently in political circumstances where the ideas generated by preeminent thinkers on race that challenge legal business-as-usual occupy central positions within political or legal responses to racism. Kimberlé Crenshaw has been arguing for 30 years that equality law, because it is conventionally conceived to operate around claims brought on the basis of one protected characteristic at a time, fails to protect women of colour who bring claims that are based on the intersection of both race and gender (for a clear illustration of the gap in coverage she is referring to, see [Degraffenried v. General Motors](#)). Intersectional claims are not legally recognised in most jurisdictions in Europe or the US. Similarly, it is rare that racial disparate impact analysis in Europe has led to radical reforms of public institutions, such as policing and educational institutions, particularly when these impacts are indirect (based on facially neutral policies or practices) or difficult to quantify.

In terms of policing-related deaths, in the United States, organisers and campaigners are fighting for the basics – the right not to be killed by police. Rules in the United States, such as qualified immunity, protect police against the killings that they commit in the course of their policing activities. This immunity is not cast in racial terms, but it has a disproportionate impact on people of colour, and black people in particular, if one understands a lack of police accountability as an extension of the violence of the policing act. Qualified immunity protects police having civil lawsuits brought against them, and if that fails, many police departments in the United States frequently settle civil claims on behalf of their officers.

Making a comparison to the German context seems absurd to some, given that the scale of police killings is much smaller in Germany. However, scale is not the

most interesting point of comparison between the United States and Germany. In Germany, if a person is killed in a policing altercation, there is no ability by the family to bring a private (civil) action on behalf of that person. The sole legal action in such cases can be brought by the prosecutorial services, and the family of the deceased person is then able to append itself to the prosecutor's main case as a secondary party to the suit. Family members' representation cannot participate in the drafting of the charges, which means that their arguments in court are limited by the prosecutor's judgment about what the police should be tried for (§ 170, § 374, § 395 StPO). If the prosecutorial investigation leads to a determination that there should not be a case at all, then the family has little recourse to pursue the issue legally, outside of requesting the rare special investigation or public inquiry. An inability for the family's lawyers to help draft charges was a grave shortcoming in the controversial watershed [case of Oury Jalloh](#), who died handcuffed to a mattress and set alight in a Dessau police station in 2005. The empowering of the state prosecutor with the sole ability to craft claims of this nature puts a great responsibility – arguably too much – on another state office, raising structural questions about conflict of interest, victims' choice of representation and embedded institutional posture. Other cases of policing deaths in Germany have been [compared and studied](#), [reported on by the United Nations](#), highlighted in [protests](#) and [documentaries](#), and commemorated with vigils and songs. As with Jalloh's case, the issues of [structural and intersectional forms of racism](#), [policing practice](#), prosecutorial power and media representation have been discussed as an interwoven set of discourses and practices. These practices do not exist independent of one another, and importantly, the local German inflections do not distract organisers and advocates from seeing similarities in cases from France, Italy, the United Kingdom and, indeed, the United States.

It is vitally important that we, as legal thinkers, are nimble enough to understand the limits of thinking about race and racism as an exclusively locally determined, ahistorical set of discourses. We are in a moment of introspection where the recognition of racism as a pervasive, structural and widespread social problem will allow us to gain a different level of understanding about how to address it in the German context. We must take advantage of this ability to learn all of its dimensions, careful not to squander the lesson with the deflection that this is someone else's problem.

